88-249

Supreme Court, U.S.
FILED
JUL 23 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

STITT SPARK PLUG COMPANY,
Petitioner

v.

CHAMPION SPARK PLUG COMPANY,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether or not the Honorable Fifth Circuit Court of Appeals panel erred in holding that STITT, Petitioner herein, did not produce an economically plausible theory of anticompetitive effect, entitling it to reach the jury upon its predatory pricing claim under Sherman Act, Section 2, and Clayton Act (Robinson-Patman) Section 2(a), when Petitioner produced substantial probative evidence in the trial court of Respondent's predatory (below cost) pricing and selling within a definable relevant geographic and product market for industrial spark plugs, and thus, affirmed a directed verdict by the District Court.

2. Whether or not the Honorable Fifth Circuit Court of Appeals panel erred in affirming a directed verdict by the District Court when Petitioner produced substantial probative evidence concerning Respondent's vast exclusive dealing activities within a definable relevant geographic and product market for industrial spark plugs in violation of Sherman Act, Section 1 and Clayton Act, Section 3.

PARTIES TO THE PROCEEDINGS IN THE COURT BELOW WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

1. STITT SPARK PLUG COMPANY, Petitioner. The STITT SPARK PLUG COMPANY does not have any parent companies, affiliates, or non-wholly owned subsidiaries and did not have throughout this proceeding.

2. CHAMPION SPARK PLUG COMPANY, Respondent.

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OFFICIAL AND UNOFFICIAL REPORTS OF ANY OPINION DELIVERED

The Honorable United States Court of Appeals for the Fifth Circuit delivered its official opinion in this matter on April 1, 1988.

GROUNDS UPON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

1. Judgment of the Honorable United States Court of Appeals for the Fifth Circuit was entered April 1, 1988.

2. Petition for Rehearing was denied by the Honorable United States Court of Appeals for the Fifth Circuit on April 29, 1988. Petition for Rehearing and Suggestion for Rehearing en banc was denied by the Honorable United States Court of Appeals for the Fifth Circuit on May 9, 1988.

3. This Court has jurisdiction to review the Judgment of the United States Court of Appeals for the Fifth Circuit in a civil action by writ of certiorari pursuant to Title 28, United States Code, Section 2101(c).

STATUTES WHICH THIS CASE INVOLVES

1. Sherman Act Section 1 (15 U.S.C. Section 1) provides that:

> "Every contract, combination . . . or conspiracy, in restraint of trade or commerce . . . is . . . illegal"

2. Sherman Act Section 2 (15 U.S.C. Section 2) provides that:

> "Every person who shall monopolize, or attempt to monopolize, . . . or conspire with any other person . . . to monopolize any part of the trade or commerce . . . shall be . . . guilty of a . . . [violation of the anti-trust laws]

3. Clayton Act Section 3 (15 U.S.C. Section 14) provides:

> "That it shall be unlawful for any person engaged in commerce . . . to contract for sale of goods . . . on condition, agreement, or understanding that the . . . purchaser thereof shall not use or deal in the goods . . . of a competitor or competitors . . . of the . . . seller where the effect of such . . . sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monoply in any line of commerce"

4. Robinson-Patman Act Section 2(a) (15 U.S.C. Section 13(a)) provides:

> "That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade or quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monoply in any line of commerce . . ."

5. Clayton Act Section 4 (15 U.S.C. Section 15) authorizes:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore . . ."

STATEMENT OF THE CASE

1. Course of Proceedings and Disposition in the Courts Below

On April 16, 1982, STITT filed its Complaint against CHAMPION in Cause No. H-82-1087, in the United States District Court for the Southern District of Texas, Houston Division, charging violations of Sections 1 and 2 of the Sherman Act, Section 3 of the Clayton Act and Section 2(a) of the Robinson-Patman Act. STITT contended that CHAMPION had violated these federal statutes in the industrial spark plug market in the United States at both the original equipment (OE) level and after sales or replacement level of said market (submarkets) by basically three activities: (1) selling substantial industrial spark plugs of a like grade or quality in the United States at predatory (below cost) prices at the original equipment level in order to capture the replacement or after sales level of the market for industrial plugs by way of the original equipment tie, (2) massive exclusive dealing activities for industrial plugs in the United States at the replacement or after sales level, and (3) price discrimination for industrial plugs of like grade or quality in the United States between sales to the original equipment industrial engine manufacturers and distributors in the replacement or after sales market, and further discrimination in price in its sales to after sales or replacement distributor accounts, all of whom bought industrial plugs from CHAMPION. STITT claimed damages under appropriate economic methods. After extensive discovery a First Amended Complaint was filed under court order of April 21, 1986, in order to amplify

and more adequately describe these charges. (R.O.A. 2650, 652, 636). Early in the discovery, however, the trial court restricted STITT'S discovery to matters subsequent to April 15, 1978, because the parties had earlier settled a similar case on or about April 15, 1978. (R.O.A. 2411, 2287). On April 6, 1984, the trial court ordered CHAMPION to provide STITT with information needed to compute whether CHAMPION charged prices for original equipment industrial plugs below average variable cost, which had previously been refused. (R.O.A. 1748). Somewhat of a delay resulted from the death of Judge George Cire, however, the case was eventually transferred to Judge Lynn Hughes, who set a trial date of August 25, 1986 (R.O.A. 65). On August 18, 1986, STITT filed its Pre-Trial Order, which was later approved by the Court prior to trial, and on August 20, 1986, CHAMPION filed its Motion in Limine which was granted by the Court prior to trial (R.O.A. 449, 163). A jury was selected and trial commenced on August 25, 1986. On the tenth day of trial, September 9, 1986, STITT rested its case and the trial court granted CHAMPION'S Motion for Directed Verdict, withdrew the case from the jury, and discharged the jury (R.O.A. 94-95, 114-123). On February 2, 1987, the trial court entered an Order Governing Release of Sealed Portions of the Trial Transcript, and after a Request to the Fifth Circuit Court of Appeals for Writ of Mandamus, the trial court belatedly filed its Findings of Fact, Conclusions of Law, and Final Judgment in this cause (R.O.A. 24, 8-10, 15). From this Final Judgment STITT duly perfected its appeal to the United States Court of Appeals for the Fifth Circuit by timely filing its Notice of Appeal and other appropriate documents (R.O.A. 6).

The case was argued before the Fifth Circuit panel in December, 1987. On April 1, 1988, the Fifth Circuit panel affirmed the Judgment of the United States District Court for the Southern District of Texas, holding that Petitioner had not presented an economically plausible theory in order to sustain a reversal of the District Court's actions. A timely Motion for Rehearing was filed and denied by the Fifth Circuit panel on April 29, 1988. A Suggestion for Rehearing en banc was denied by the Fifth Circuit on May 9, 1988, whereupon Petitioner brings this Petition.

2. Statement of Facts

It was undisputed by the pleadings in this cause that Respondent, CHAMPION, has its principal office in Toledo, Ohio, and that it makes and sells spark plugs for industrial application. It was further established by the pleadings that the acts of CHAMPION were authorized and accomplished by corporate officers, agents and employees while they were actively engaged in the management, control, and direction of CHAMPION'S business. That in some instances spark plugs differ according to the type of end use. That industrial spark plugs are sold by plug manufacturers to engine manufacturers for use in original equipment ("OE sales"). That plug manufacturers also sell industrial plugs to warehouse distributors for resell to jobbers ("parts houses"), who in turn resell them to end users. That CHAMPION manufactures industrial spark plugs at its plant in Toledo, Ohio, and its industrial spark plug production is sold from its Toledo plant to customers in all states throughout this country. That CHAMPION'S business, including the manufacture, sale and transportation of industrial

spark plugs, constitutes and involves interstate commerce. That the entire process of manufacture, distribution and sale of industrial spark plugs substantially affects interstate commerce. That STITT competes with CHAMPION and operates a manufacturing facility in Conroe, Texas (R.O.A. 449, 627, 636, 652).

STITT'S Amended Complaint alleges a product market for industrial spark plugs, that is, those plugs manufactured for industrial application, both in large and small industrial stationary engines. It alleges that there are distinct customers for these plugs, specialized vendors, in some cases a lack of interchangeability, in some cases different manufacturing, and industry and public recognition of these plugs as a separate market. It alleges that the market is divided into submarkets for original equipment (OE) and replacement sales, and that industrial spark plugs are sold by plug manufacturers to engine manufacturers for use as original equipment, and to warehouse distributors for replacement sales. The warehouse distributors then resell them to jobbers and end users. It alleges that CHAMPION and STITT are the only significant domestic manufacturers of industrial plugs in the United States and that the United States constitutes a relevant geographic market for the sales of these industrial plugs. It further alleges that the two (2) submarkets (OE and replacement) are tied together by what is known as the "OE tie", or simply put, the preference to use in the replacement market the same brand plug as used in the original equipment (R.O.A. 638-641). To the extent that the trial court's Findings of Fact in this case suggest that STITT suggested in its pleadings or evidence, six different markets, did not plead all industrial plugs, embodied its entire market claim in exhibits 277, and/or

pleaded a market with glow plugs and furnace starters, said findings are clearly erroneous. To the extent that the trial court's Findings of Fact affirm the "OE tie" concept they are correct. (R.O.A. 15-17). The Fifth Circuit opinion assumes that Petitioner adequately defined a relevant market. (Footnote 19, Page 2568).

The Petitioner's trial presentation consisted of approximately eight (8) former CHAMPION employees, district sales managers and territorial managers for Texas, Oklahoma, and Louisiana, the deposition testimony of several of CHAMPION'S present employees called as adverse witnesses, the testimony of A. R. Brenholts, Jr. and A. R. Brenholts, Sr., the President and Chairman of the Board of STITT, the testimony of Charles Hereford, a certified public accountant with Hereford, Lynch and Company, and the testimony of Barry Wilbratte, an economist and professor at the University of St. Thomas in Houston, Texas. The product definition to be distilled from the Appellant's witnesses at trial indicates that industrial plugs are in fact defined as plugs used for industrial engines and that these may be large or small stationary engines, fueled by gasoline or natural gas. This is supported by the testimony of former CHAMPION employees, Ray Loard, Jerry Sartor, John Blesi, J. J. Maner, Kenneth Revord, Sims Armstrong and Frank McCue. Mr. Brenholts, Sr. and Mr. Brenholts, Jr. gave similar definitions, as well as Edwin Frost, the President of B. G. Service Company. Finally, present employees of CHAMPION, Zang, Schwalbe, Westenkirchner, Hoyt and Midgley, gave essentially this definition (R.O.A. 162 [T. Loard] 10-11, R.O.A. 45 T. Vol. II 10-11, 50, R.O.A. 45 T. Vol. II 66-67, 75, R.O.A. 44 T. Vol. III 22, 40, R.O.A. 44 T. Vol. III 95, 97, R.O.A. 44 T. Vol. III 180-182, R.O.A.

41 T. Vol. VI 128, R.O.A. 40 T. Vol. IV 67-68, R.O.A. 38 T. Vol. VIII 97-98, 101, 104, R.O.A. 37 T. Vol. IX 66, R.O.A. 37 T. Vol. IX 69, R.O.A. 37 T. Vol. IX 76, R.O.A. 37 T. Vol. IX 87).

Numerous former CHAMPION employees, as well as Brenholts, Jr. and Brenholts, Sr., along with Edwin Frost, also specifically discussed the distinguishing factors and characteristics of industrial plugs as versus other types, and distinguished certain examples of industrial plugs manufactured by CHAMPION from other types, with reference to heat range, electrode design, price, distinct vendors, district customers, unique production facilities, and views of the industry and public. (R.O.A. 162 T. [Loard] 14-16, R.O.A. 45 T. Vol. II 21-22, R.O.A. 45 T. Vol. II 75, R.O.A. 44 T. Vol. III 2, R.O.A. 44 T. Vol. III 97, R.O.A. 44 T. Vol. III 182-185, R.O.A. 42 T. Vol. V 47-50, 56-58, 68, R.O.A. 41 T. Vol. VI 7, 12, 15-16, 18-20, 27-35, 44-45, 49-51, 55, 77, R.O.A. 38 T. Vol. VIII 13-14, 42, R.O.A. 38 T. Vol. VIII 101-102, 104).

The several witnesses also defined the participants in this industrial market as being primarily CHAMPION, with STITT a distinct second, and a very small amount of B. G. Witnesses, Loard and Sartor, former district sales managers for CHAMPION, felt CHAMPION'S share was in excess of 90%, witness Revord, a former territorial manager, felt CHAMPION'S share was about 90%, and Brenholts, Jr. felt CHAMPION'S share approached 100%. Various witnesses also excluded A C, Autolite, and other companies from participation in the market, and Barry Wilbratte, the STITT economist projected CHAMPION'S share at 99%. All of this testimony was based primarily upon CHAMPION virtually

capturing nearly all of the original equipment contracts with the industrial engines manufacturers. (R.O.A. 162, T. Loard 98-102, R.O.A. 45 T. Vol. II 20, 77, R.O.A. 44 T. Vol. III 75, R.O.A. 44 T. Vol. III 98-99, 104-105, 164-165, R.O.A. 44 T. Vol. III 185, 201, 208-209, R.O.A. 42 T. Vol. V 42, 125, R.O.A. 41 T. Vol. VI 22-52, 84-87, 102, R.O.A. 38 T. Vol. VIII 8, 19, 46, R.O.A. 38 T. Vol. VIII 105-106, 109-110, R.O.A. 37 T. Vol. IX 27, R.O.A. 36 T. Vol. X 3, 7, 113, 115, 118, 135).

All of the former CHAMPION employees, as well as several current employees and the Brenholts, agreed that the United States constituted a separate geographical market for industrial spark plugs, that this geographic market was distinguished from European and other foreign markets, and was treated as such by the market participants. To the extent that the trial court's Conclusions of Law and Findings of Fact indicate to the contrary they are clearly erroneous. (R.O.A. 10-12, 15-17) (See: R.O.A. 162 T. [Loard] 13-14, R.O.A. 45 T. Vol. II 9, 78, R.O.A. 44 T. Vol. III 3, R.O.A. 44 T. Vol. III 94, R.O.A. 44 T. Vol. III 185, R.O.A. 41 T. Vol. VI 105, R.O.A. 41 T. Vol. IV 110, R.O.A. 38 T. Vol. VII 116, R.O.A. 37 T. Vol. IX 28, R.O.A. 37 T. Vol. IX 42-43, 67, R.O.A. 37 T. Vol. IX 82-83).

Further, the witnesses testified as to the "OE tie" between the original equipment level and the replacement level of the industrial spark plug market, thereby confirming a product submarket at each level connected by the OE tie (R.O.A. 162 T. [Loard] 41, R.O.A. 45 T. Vol. II 13-15, R.O.A. 44 T. Vol. III 77, R.O.A. 44 T. Vol. III 104-107, 173, R.O.A. 44 T. Vol. III 210-

211, 214-216, 225, 228, 231, R.O.A. 41 T. Vol. VI 56, R.O.A. 41 T. Vol. VI, 157-58, R.O.A. 38 T. Vol. VIII 69, R.O.A. 38 T. Vol. VIII 106-106, R.O.A. 37 T. Vol. IX 85-86, R.O.A. 37 T. Vol. IX 99, 103, 107).

The trial court in its Findings of Fact and Conclusions of Law stated that STITT pleaded a market encompassed in PX 277. This is clearly erroneous. The witnesses, Brenholts, Jr. and Brenholts, Sr., testified that PX 277, PX 283, as well as DX 3, were lists developed in discovery based upon information CHAMPION supplied in interrogatories on questions relating to industrial plugs. Since designations of plug types were changed frequently by CHAMPION, the lists attempted an industrial plug framework for discovery at the original equipment level, in order that STITT'S experts might have specific types at hand to perform their work. STITT'S expert, C.P.A. Hereford, excluded from projections those in which all information was not available. Certain CHAMPION K stock industrial plug information was never provided by CHAMPION. At best, these lists were suggested samples of the industrial spark plug original equipment market based upon the information available, but were not *totally* inclusive or exclusive, but did form discovery parameters in order that the case could proceed properly on pre-trial matters. The pleaded and proved market was the industrial spark plug market (R.O.A. 41 T. Vol. VI 66, 94, R.O.A. 37 T. Vol. IX 12, R.O.A. 37 T. Vol. IX 30-31, R.O.A. 40 T. Vol. 7, 139-140, 165, R.O.A. 660-678, 693-705, R.O.A. 11-12, 16, 17).

STITT'S certified public accountant, Charles Hereford, traveled to Toledo, Ohio, under court order, reviewed statistical data and conducted an interview with CHAM-

PION personnel to determine average variable manufacturing cost or average variable cost of all CHAMPION industrial plug types, supplied in answers to interrogatories on PX 283, 277 and 338. He analyzed all those types of which CHAMPION supplied complete information for, within time frames for said analysis from April 15, 1978 to July 31, 1985. The time frames basically ran from August 1 to July 31 of each year. His in depth analysis concluded that substantial amounts of industrial types were sold below average variable cost in the original equipment (OE) market and replacement market for each of the time frames. These plugs included certain CHAMPION types CHAMPION suggested to be non-industrial at trial.[1] (R.O.A. 40 T. Vol. VII 130, 132-137, 139, 141-165, 178, PX 277, 283, 341, 338, R.O.A. 161 T. Hereford 33-34, 36, 38, 41).

The contingent of former CHAMPION employees, Loard, Sartor, Blesi, Maner, Revord, Armstrong, and McCue, confirmed CHAMPION'S exclusive dealing activities at the replacement level of the market for industrial plugs directed both at warehouse distributors and jobbers. Specifically, there was testimony that in many cases CHAMPION employees were removing STITT plugs and that these removals were made under conditions, agreements or understandings, that they would phase out and do away with STITT, in order to take on the CHAMPION industrial line, and this

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1. An order from the trial court entered after the Final Judgment prevents Appellant from an in depth analysis of the plug types or the substance of Hereford's testimony related to the exact amounts of below cost sales. The court is directed to a complete reading of R.O.A. 40 T. Vol. VII, PX 277, 283, 341, 338, and R.O.A. 161 T. [Hereford] for this information (R.O.A. 24-26). (See Appendix sealed portions).

was induced by offering awards, etc. to the warehouse distributors and jobbers. (R.O.A. 162 T. Loard 25-26, 28-29, 31-33, 35-39, 44-49, 51, 86-87, 89-91, R.O.A. 45 T. Vol. II 15-16, 25-26, 28, 30, 32-35, 38-39, R.O.A. 44 T. Vol. III 36-38, R.O.A. 44 T. Vol. III 120-122, 126-127, R.O.A. 44 T. Vol. III 189-190, 195, 198-200, 207, R.O.A. 41 T. Vol. III 233, R.O.A. 41 T. Vol. VI 94, R.O.A. T. Vol. VI 117-118, 142, R.O.A. 40 T. Vol. VIII 81, 86, 91-92).

STITT proferred evidence in the trial court that CHAMPION had discriminated in price on its sale of industrial plugs of the same grade or quality between original equipment industrial engine accounts (OE) and replacement or after sales accounts, and further had discriminated in price in its sale of industrial spark plugs of the same grade or quality to its replacement accounts in sales to its warehouse and other intermediate level distributors, who provided industrial spark plugs to jobbers and end users of such plugs, i.e. NAPA v. normal warehouse distributors, C-Fleet v. normal warehouse distributors, oil companys v. normal warehouse distributors. Former and present CHAMPION employees testified as to these practices. (R.O.A. 162 T. Loard 41, 42-43, 128-129, R.O.A. 45 T. Vol. II 29, R.O.A. 44 T. Vol. III 115-116, 124, R.O.A. 44 T. Vol. III 237, 238, R.O.A. 43 T. Vol. IV 16, R.O.A. 41 T. Vol. VI 148-149, R.O.A. 38 T. Vol. VIII 76-77, 81, 85-86, R.O.A. 37 T. Vol. IX 45-46, R.O.A. 37 T. Vol. IX 85-86).

Sufficient damage evidence was proferred by way of testimony of A. R. Brenholts, Jr., and A. R. Brenholts, Sr. and their economist, Barry Wilbratte, as well as supporting documents and calculations. Brenholts, Jr. testi-

fied as to the fact of damage, and that but for the CHAMPION activities, the productive capacity of his plant would be three to five times what it was in the relevant time frames. The effects of the CHAMPION'S below cost selling, exclusive dealing activities and price discrimination upon STITT'S business, and the fact of damage, were fully discussed by both Brenholts, Jr. and Brenholts, Sr. (R.O.A. 43 T. Vol. IV 37, 40-47, 56-58, R.O.A. 42 T. Vol. V 74, 125, 139-140, 144, 147, R.O.A. 38 T. Vol. VIII 114-115, R.O.A. T. Vol. IX 39).

Barry Wilbratte, the STITT economist, confirmed the fact of damage based upon supporting data and computed the quantum of damages to STITT based upon reduced STITT sales from CHAMPION activities, translating into reduction of STITT profits during the time frames since April 15, 1978. He discussed the factors creating damages to STITT and indicated the most important was predatory (below cost) selling, although he included the factors of exclusive dealing and price discrimination. (R.O.A. 37 T. Vol. IX 95-200, 105, 106-107). Wilbratte computed market shares over the time period and found CHAMPION with 99%. He computed STITT'S loss of profits from April 15, 1978, to the present, and future damages from the present period to 2009, used the appropriate rates, discounted properly, and found damage figures of present and future at $4,864.22 (for three times productive capacity), present and future of $14,770.762 (for five times productive capacity). All of these computations were supported by reasonable rates and calculations. (R.O.A. 36 T. Vol. X 3-25, 113-115, 117-118, 119-129, 135-138).

To the extent that the trial court's Findings of Facts and Conclusions of Law suggest that no fact of damage

was proved or that the damages were not adequately separated from the pre-April 15, 1978, time period, same are clearly erroneous. (R.O.A. 21-22, 23, R.O.A. 36 T. Vol. X 13, 111-113).

Both Brenholts, Jr. and Wilbratte explained thoroughly entry barriers in the industrial spark plug business because of the OE tie and practices of CHAMPION. (R.O.A. 43 T. Vol. IV 26, 37, 40, 56-57, R.O.A. 37 T. Vol. IX 99-100, 193, 196, R.O.A. 36 T. Vol. X 8-11).

ARGUMENT

The Honorable panel of the United States Court of Appeals for the Fifth Circuit has decided a federal question in a way in conflict with the applicable decisions of this Court and its own decisions, as set out below.

Specifically, the Fifth Circuit opinion in this case is in conflict with this Court's opinion in *Ford Motor Company v. United States,* 405 U.S. 565 (1972) in an industrial spark plug market setting.

1. THE FIFTH CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT STITT DID NOT PRODUCE AN ECONOMICALLY PLAUSIBLE THEORY OF ANTICOMPETITIVE EFFECT ENTITLING IT TO REACH THE JURY ON ITS PREDATORY PRICING CLAIM UNDER SHERMAN ACT SECTION 2, CLAYTON ACT SECTION 2(a), AND PRICE DISCRIMINATION UNDER CLAYTON ACT SECTION 2(a).

The Fifth Circuit panel in its opinion of April 1, 1988, correctly recognized that both STITT and CHAMPION sell their industrial plugs to two distinct kinds of pur-

chasers. One group consisting of those who manufacture engines in which spark plugs are used as *original equipment*, and the other group being warehouse distributors and retail parts stores, that purchase for resale to engine owners as replacement equipment. The panel further correctly recognized that this dichotomy created two "markets" (Paragraph I, Page 2564). The Court's panel also observed that Champion sold its plugs to OE manufacturers at prices well below those of replacement plugs, even though the products are otherwise identical. This general statement is correct. However, the evidence showed that the sales to the OE manufactures were below *average variable cost* (Paragraph I, Page 2564). *The statistical analysis* (PX 338, 341) *even showed numerous instances of the industrial plugs sold in the replacement market at below average variable cost.* This is extremely significant to the courts erroneous findings of fact and law, as will be pointed out, *infra.*

The Fifth Circuit's decision of April 1, 1988, then draws upon the claimed applicability of the recent Supreme Court case of *Matsushita Electric Industrial Company v. Zenith Radio Corporation*, 475 U.S. 574, 106 S. Ct. 1348, 89 L.Ed.2d 538 (1986), a case affirming a summary judgment where the Plaintiff alleged a *Sherman Section 1* alleged predatory pricing conspiracy, quoting the *Matsushita* language at pages 1356-1359 (Paragraph II A, Pages 2564-2565). The problem, and error in the law, in finding Appellant's position not economically plausible, based upon *Matsushita*, is that 1) this was a Sherman Section 1 case and the Supreme Court observed that ". . . antitrust law limits the range of permissible inferences from ambiguous evidence in a Section 1 case . . ." and 2) *Matsushita* is not a case

involving pricing *below average variable cost* by a single firm, but one involving pricing at some level of incremental costs, *Matsushita* at page 1355, footnotes 8-9, page 1357. Unlike *Matsushita*, *Stitt v. Champion* is a Sherman Act Section 2 case, with direct evidence of virtually 100% of OE spark plugs sold below average variable cost in the OE market, as well as numerous instances of sales below average variable cost in the replacement market (PX 338, 341).

In an unbroken line of decisions the Fifth Circuit had recognized and adopted the position that predatory pricing may be demonstrated by showing that the Defendant sacrificed present revenues for the purpose of driving Plaintiff out of the market, with the hope of recouping losses through subsequent higher prices. The Fifth Circuit had observed that in order to prove that Defendant has sacrificed present revenues, it is only necessary to establish that Defendant's prices were *below marginal or average variable cost. Adjusters Replace-A-Car v. Agency Rent-A-Car, Inc.*, 735 F.2d 884, 890 (5th Cir. 1984); *International Air Industries, Inc. v. American Excelsior Co.*, 517 F.2d 714 (5th Cir. 1975). Precisely this has been shown in the evidence, in the Fifth Circuit's recognized OE market (submarket), and even in some instances, in the Fifth Circuit's recognized replacement market (submarket).

Hence, the Fifth Circuit's decision of April 1, 1983, is in conflict with its own decisions in the *Adjusters-Rent-A-Car*, case, supra, and the *International Air Industries*, case, supra, as well as footnote 9 of page 1355 of the *Matsushita* case, *supra*.

Champion was charged with not only attempted monopolization, but also *monopolization* under Sherman

Act Section 2 and price discrimination under Clayton Act Section 2(a). *Below cost* selling alone, in a definable market, taken together with the *size* of the market share (99%), is probative of monopolization. The Fifth Circuit's opinion of April 1, 1988, gives no effect whatsoever to the monopolization claim or the market share evidence. Given the evidence therefore, the Fifth Circuit decision conflicts with its own decision in *Heatransfer Corp. v. Volkswagenwerk, Inc.*, 553 F.2d 964, 981 (5th Cir. 1977), *reh. den.*, 562 F.2d 1257, *cert. den.*, 434 U.S. 1087.

The Fifth Circuit's opinion of April 1, 1988, then substitutes a fictional hypothesis in order to reach the conclusion that Stitt failed to prove below cost selling and hence predatory pricing. The Fifth Circuit panel stated that when Champion sets prices for original equipment plugs, the expected return also must include replacement purchases that will follow, (". . . *Hence, any meaningful comparison of price and cost must encompass Champion's sales to both markets. Stitt's evidence did not demonstrate that Champion's practices were "predatory" across both markets . . .*") citing *Bayou Bottling, Inc. v. Dr. Pepper Co.*, 725 F.2d 300, 305 (5th Cir. 1985) as authority for the proposition that a predatory pricing analysis must include the entire product line. Thus, the panel of the Fifth Circuit has used the concept of OE tie, to take the position for the first time, that when one market or submarket is tied to a second market or submarket by such an OE tie, for whatever the reason, in a predatory below cost pricing claim, the Plaintiff must prove both below cost pricing at the OE market and also at the replacement level, even though they are two recognizably distinct markets. Under *Bayou Bottling*

supra, the panel suggests that if this is not done, the entire product line is not analyzed. There are several problems with this approach.

First, it allows the court to substitute its legal opinion for the factual issue that in an OE tie case, where there are two defined markets, there is really only *one market* and that is the overall market at both levels for industrial plugs. Such a substitution is inconsistent and in conflict with the Fifth Circuit's opinions that relevant market is a fact issue for the jury. *Pinder v. Hudgins Fish Co., Inc.*, 570 F.2d 1209, 1220 (5th Cir. 1978); *Dougherty v. Continental Oil Company*, 579 F.2d 984 (5th Cir. 1978, *jud. vac.*, 591 F.2d 1206); *Hornsby Oil Company, Inc. v. Champion Spark Plug Company*, 714 F.2d 1384 (5th Cir. 1983). The opinion, including the assumption, also conflicts with the case of *Ford Motor Company v. United States*, 405 U.S. 565 (1972) which defines *two markets* and not one market.

Secondly, the *Bayou Bottling* case, supra, can not support this proposition. In that case there was only *one* market, the product market for soft drinks. The full or entire product line was within the one market, and the below cost pricing was not shown for the entire line within the one market. The Fifth Circuit has now expanded this concept to include *two markets*, whenever connected by an OE tie or consumer preference. This is in conflict with the Fifth Circuit's prior decisions and a case of first impression.

Third, the Fifth Circuit panel's decision does not square with the evidence in this cause. The decision presumes there to be no below cost pricing in the replacement market. Such is not the case. Numerous in-

stances of below cost pricing were even found in the replacement market, designated as after market upon the CPA exhibits. True, they were not as extensive as the OE market, but even these were substantial. (See PX 341). Hence, both markets were analyzed and below cost pricing actually occurred in both. The amount and degree is just less in the replacement or after market. Therefore, even under this panel's interpretation, the entire line was analyzed.

Further, the Fifth Circuit panel holds Stitt's position is not economically plausible. The panel has therefore substituted its opinion for that of the economist, Mr. Wilbratte, who concluded that Stitt had suffered injury by the Champion practices under this theory of the case. Champion brought no economist to testify that this was an economically implausible theory. The case therefore should have gone to the jury.

2. THE FIFTH CIRCUIT COURT OF APPEALS DECISION OF APRIL 1, 1988, CONFLICTS WITH ITS HOLDING IN DILLION MATERIALS HANDLING, INC. v. ABLION INDUSTRIES, 567 F.2d 1299 (5th Cir. 1979).

The Fifth Circuit's decision in *Dillion, supra,* lays out the requisites for proof of exclusive dealing under Sherman Act Section 1 and Clayton Act Section 3. Jury issues were raised under that case and the panel's decision conflicts with such. Conditions, agreements, or understandings from the basis of exclusive dealing claims in violation of Sherman Act, Section 1, and Clayton Act, Section 3, *Dillion Materials Handling, Inc. v. Ablion Industries,* 567 F.2d 1299 (C.A. 5, 1979). Ray Loard

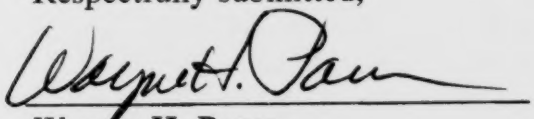
testified that he made an exclusive dealing *agreement* with Oklahoma Rig through Mr. Schultz to replace Stitt with Champion and get rid of Stitt. He further testified that the agreement was complied with (R.O.A. 162 T. [Loard] 33-37, 86-87). He further testified that Mr. and Mrs. Coldwell *agreed* to get rid of Stitt to become a distributor for Champion. He stated that the Stitt plugs in this instance were returned (R.O.A. 162 T. [Loard] 37-38). He further identified a company in Hennessey, Oklahoma, that got rid of Stitt under an *agreement* with Champion, and said that hundreds did the same thing (R.O.A. 162 T. [Loard] 38).

Oklahoma Rig and other distributors, as well as jobbers, were prevented from purchasing Stitt on a national basis by these activities of Champion, as discussed above. Each of the former Champion employees testified that this was a national Champion program. Mr. Brenholts, Sr. testified as to the effect upon Stitt's business, as did the economist, Barry Wilbratte (R.O.A. 43 T. Vol. IV 37, 40-47, 56-58, R.O.A. 38 T. Vol. VIII 111-115, R.O.A. T. Vol. IX 39, R.O.A. 37 T. Vol. IX 95-200, 105, 106-107).

In the light of this testimony, Champion can not possibly contend that a significant fraction of the Stitt business has not been lost. A jury issue was certainly created. The economist, Mr. Wilbratte, projected an impact upon Stitt's national business by these foreclosures. The Fifth Circuit's decision substitutes the court's opinion for this testimony and is improper.

WHEREFORE, PREMISES CONSIDERED, Stitt Spark Plug Company prays this Honorable Court grant a Petition for Writ of Certiorari in the above styled matter for the foregoing reasons.

Respectfully submitted,



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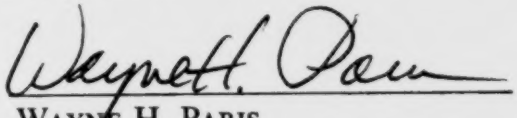
Stitt Spark Plug Company

CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of this Petition for Writ of Certiorari and Appendix have been forwarded to Mr. Rufus W. Oliver, III and N. K. Alexander, Baker & Botts, 3000 One Shell Plaza, Houston, Texas 77002, and Mr. Donald F. Melhorne, Marshall & Melhorne, Four Seagate, 8th Floor, Toledo, Ohio 43604, by certified mail, return receipt requested, on this the 10th day of August, 1988.



WAYNE H. PARIS

APPENDIX

STITT SPARK PLUG CO.,
Plaintiff-Appellant,

v.

CHAMPION SPARK PLUG CO.,
Defendant-Appellee.

No. 87-2656.

United States Court of Appeals,
Fifth Circuit.

April 1, 1988.

Industrial spark plug manufacturer brought antitrust action against competing manufacturer of industrial, commercial, and dual spark plugs. The United States District Court for the Southern District of Texas, Lynn N. Hughes, J., entered directed verdict for competing manufacturer, and plaintiff manufacturer appealed. The Court of Appeals, Patrick E. Higginbotham, Circuit Judge, held that: (1) plaintiff manufacturer did not present jury question on predatory pricing claim on allegations competing manufacturer sold spark plugs in original equipment market at prices below cost in order to eliminate plaintiff manufacturer as competitor in replacement plug market; (2) plaintiff manufacturer did not present jury question as to whether price discrimination with anticompetitive effect required for Robinson-Patman Price Discrimination Act prohibition to apply existed; and (3) plaintiff manufacturer did not present jury question as to whether any anticompetitive practice of competing manufacturer re-

lating to agreements with distributors to carry competing manufacturer's plugs exclusively handicapped plaintiff manufacturer.

Affirmed.

Appeal from the United States District Court for the Southern District of Texas.

Before BROWN, JOHNSON and HIGGINBOTHAM, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

Stitt Spark Plug Company brought this antitrust suit against Champion Spark Plug Company alleging that Champion engaged in anticompetitive practices, including price discrimination, predatory pricing and exclusive dealing, violative of the Sherman and Robinson-Patman Acts. The district court entered a directed verdict for Champion after Stitt presented its evidence to the jury. We find that Stitt's theory of predatory pricing is implausible and that a reasonable jury could not have concluded that any exclusive dealing agreements with dealers denied Stitt access to the market for industrial spark plugs. We affirm.

I

Champion Spark Plug Company is the leading independent manufacturer of spark plugs, and sells at least three hundred different models of plugs, many of which can be used in a variety of different engines. Champion's plugs fall into three broad categories: "industrial" plugs, for use in large, stationary engines; "commercial" plugs, for automotive and smaller engines; and "dual" plugs,

which can be used in either industrial or commercial engines. Stitt Spark Plug Company, a smaller manufacturer, makes over two hundred different models, nearly all of which fall into the "industrial" category.

Both companies sell their spark plugs to two distinct kinds of purchasers. One group of buyers consists of companies that manufacture engines in which spark plugs are included as original equipment. The other group consists of warehouse distributors and retail part stores that purchase spark plugs for resale to engine owners as replacement equipment. The two "markets" are related, however, in that engine owners tend to purchase replacement plugs of the same brand as the plugs that came with the engine originally. Stitt's witnesses provided at least three explanations for this preference: (1) engine operators have confidence in the original brand of plug because it performed well; (2) operators trust that the engine manufacturer selected the original brand because it was well suited for the engine; and (3) operators fear that use of a different brand will endanger the engine's warranty.

In order to capitalize on this consumer preference, Champion sells spark plugs to original equipment manufacturers at prices well below the price of replacement plugs, even though the products are otherwise identical. Stitt brought this lawsuit alleging that Champion's pricing policy was predatory and in violation of the antitrust laws. The suit also alleged that Champion was guilty of price discrimination and exclusive dealing. After Stitt presented its evidence to a jury, the district court issued a directed verdict for Champion on all counts.

II

Stitt accused Champion of three kinds of anticompetitive conduct: predatory pricing under Sherman Act § 2 and Clayton Act § 2(a); price-discrimination under Clayton Act § 2(a); and exclusive dealing under Sherman Act § 1 and Clayton Act § 3. We deal with each allegation in turn, keeping in mind that the district court should have granted a directed verdict only if reasonable people could not arrive at a verdict against Champion after considering all the evidence and all reasonable inferences that can be drawn from it in a light most favorable to Stitt's case.[1]

A

[1] Stitt first argues that Champion sold spark plugs in the original-equipment market at prices below cost in order to eliminate Stitt as a competitor in the replacement market. This conduct, according to Stitt, was an illegal attempt to monopolize within the meaning of Sherman Act § 2[2] as well as unlawful price discrimination in violation of Clayton Act § 2(a).[3] Because we use a similar standard for judging assertions of predatory pricing under these statutes,[4] we discuss the claims together.

The Supreme Court recently discussed predatory pricing in *Matsushita Electric Industrial Co. v. Zenith Radio*

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1. *See Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969).

2. 15 U.S.C. § 2.

3. 15 U.S.C. § 13(a).

4. *See Malcolm v. Marathon Oil Co.*, 642 F.2d 845, 853 n. 16 (5th Cir.), *cert. denied*, 454 U.S. 1125, 102 S. Ct. 975, 71 L.Ed.2d 113 (1981).

Corp.[5] *Matsushita* considered the claim of American television manufacturers that a group of Japanese competitors conspired to lower the price of television sets in order to drive American manufactures out of business. In holding that the district court properly dismissed the case on summary judgment, the Court noted that plaintiff's burden was to "come forward with 'specific facts showing that there is a *genuine issue for trial,*'"[6] that is, one that is economically plausible in light of the evidence presented. "[I]f the factual context renders respondents' claim implausible—if the claim is one that simply makes no economic sense—respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary [to avoid summary judgment]."[7] The Court went on to hold that the economic disincentives to predatory pricing often will justify a presumption that an allegation of such behavior is implausible.

> [T]he success of [predatory pricing] schemes is inherently uncertain: the short-run loss is definite, but the long-run gain depends on successfully neutralizing the competition. Moreover, it is not enough simply to achieve monopoly power, as monopoly pricing may breed quick entry by new competitors eager to share in the excess profits. The success of any predatory scheme depends on *maintaining* monopoly power for long enough both to recoup the predator's losses and to harvest some additional gain.

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5. 475 U.S. 574, 106 S. Ct. 1348, 89 L.Ed.2d 538 (1986); *see also Cargill, Inc. v. Monfort of Colorado, Inc.*, ____U.S.____, 107 S. Ct. 484, 493-94, 93 L.Ed.2d 427 (1986) (discussing predatory pricing).

6. *Matsushita*, 106 S. Ct. at 1356 (emphasis in opinion) (quoting Fed. R. Civ. P. 56(e)).

7. *Matsushita*, 106 S. Ct. at 1356.

> Absent some assurance that the hoped-for monopoly will materialize, *and* that it can be sustained for a significant period of time, "[t]he predator must make a substantial investment with no assurance that it will pay off." Easterbrook, Predatory Strategies and Counterstrategies, 48 U. Chi. L. Rev. 263, 268 (1981). For this reason, there is a consensus among commentators that predatory pricing schemes are rarely tried, and even more rarely successful.[8]

As the Court recognized, predatory pricing can be anticompetitive if it contributes to monopoly power; the successful predator eliminates its competitors in order to raise prices above competitive levels at a later time.[9] Stitt's theory here is different: Champion is accused of cutting prices in one market—original equipment—in order to capture concurrent gains in another market—replacement equipment. It is central to Stitt's theory that purchasers of replacement spark plugs prefer the same brand that came with the equipment when new.[10]

Premised on this theory, Stitt's evidence could not support an economically plausible inference that Champion's policy was aimed ultimately at raising prices above competitive levels. Under Stitt's theory that a sale to an original-equipment manufacturer assures sales to the re-

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8. *Id.* at 1357-58.

9. *See Adjusters Replace-A-Car, Inc. v. Agency Rent-A-Car, Inc.*, 735 F.2d 884, 889 (5th Cir. 1984), *cert. denied*, 469 U.S. 1160, 105 S. Ct. 910, 83 L.Ed.2d 924 (1985); *International Air Industries, Inc. v. American Excelsior Co.*, 517 F.2d 714, 723 (5th Cir. 1975), *cert. denied*, 424 U.S. 943, 96 S. Ct. 1411, 47 L.Ed.2d 349 (1976).

10. The phenomenon that consumers prefer the original plug for replacement is not new to antitrust law. *See Ford Motor Co. v. United States*, 405 U.S. 562, 565, 92 S. Ct. 1142, 1145, 31 L.Ed.2d 492 (1972) (discussing "OE tie" in automotive spark plugs).

placement market, an inquiry into competitive effect must look at the original and replacement markets together. When Champion sets the prices for original-equipment plugs, the expected return includes not only the price paid by the original-equipment manufacturer, but also the replacement purchases that probably will follow. Hence, any meaningful comparison of price and cost must encompass Champion's sales to both markets.[11] Stitt's evidence did not demonstrate that Champion's practices were "predatory" across both markets.

Looking at it another way, Stitt never proved that Champion's recoupment of losses on below-cost sales depended upon the absence of Stitt as a competitor. No action of Champion prevented Stitt from also pricing its product to original-equipment manufacturers with an expectation of return from the replacement market. Stitt's own witnesses testified that the consumer preference can be captured by *any* manufacturer who can place its plugs with engine makers.[12] Hence, any ability Champion may have had to raise prices for replacement plugs was not the result of market power. Without an economically plausible theory of anticompetitive effect, Stitt was not entitled to reach the jury on the predatory-pricing claim.

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11. *Cf. Bayou Bottling, Inc. v. Dr. Pepper Co.*, 725 F.2d 300, 305 (5th Cir.) (stating that predatory-pricing analysis must include entire product line), *cert. denied*, 469 U.S. 833, 105 S. Ct. 123, 83 L.Ed.2d 65 (1984).

12. Counsel for Stitt retreated from this admission at oral argument, contending for the first time that consumers tended to use Champion plugs for replacement purposes because Champion's exclusive-dealing practices made other brands unavailable. Such a theory is inconsistent with the essence of the predatory-pricing claim: if Champion so dominated the replacement market, it would not need to sell below cost in the original equipment market.

B

[2] Stitt also alleged that Champion engaged in two kinds of illegal price-discrimination: Champion charged different prices in the markets for original and replacement equipment, as we discussed, and Champion varied its prices between different warehouse distributors of replacement plugs. Stitt contended that these practices constituted an attempt to monopolize in violation of Sherman Act § 2. Stitt also complained that this discrimination violated the Robinson-Patman Act, which prohibits either direct or indirect "discrimination in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce. . . ."[13]

We explained in *International Air v. American Excelsior Co.*,[14] that when a company claims that its competitor engaged in price discrimination—a "primary-line" claim—injury to competition is not established by evidence of "a mere diversion of business from one competitor to another."[15] In *International Air*, we affirmed entry of a directed verdict against a manufacturer of cooling pads who sued a competitor alleging that the compeitor charged lower prices in some cities than in others. We found the directed verdict appropriate because there was no evidence that the defendant predatorily priced; in charging differential prices the defendant had not "sacrificed present revenues for the purposes of

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13. 15 U.S.C. § 13(a).

14. 517 F.2d 714 (5th Cir. 1975).

15. *Id.* at 721.

driving [the plaintiff] out of the market."[16] For proof of competitive effect, Stitt rests upon its assertion that the differences in price constitute predatory behavior.

As we have explained, Stitt failed to prove that Champion's pricing of spark plugs in the original and replacement equipment markets was predatory. On this record, then, there was no attempt to monopolize nor proof of "lessened competition" within the meaning of the Robinson-Patman Act.

Champion did not deny that it sold industrial spark plugs to NAPA, a national chain of auto parts stores, at a lower price than it sold to other warehouse distributors and intermediate sellers. However, Stitt never produced evidence that the price difference inhibited competition or even its ability to compete in the replacement plug market; indeed, Stitt's brief on appeal fails to offer any theory as to why this should be so. Because the Robinson-Patman Act only prohibits price-discrimination with the requisite anticompetitive effect, the district court was justified in entering a directed verdict on this issue.

C

[3] Stitt also alleged that Champion violated the Clayton Act in making agreements with distributors to carry Champion plugs exclusively. Section 3 of the Act makes it unlawful to

> make a sale or contract for sale of goods . . . on the condition, agreement, or understanding that the . . . purchaser thereof shall not . . . deal in the

16. *Id.* at 723.

> goods . . . of a competitor . . . of the . . . seller, where the effect of . . . such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.[17]

The written agreement between Champion and its distributors disclaimed any obligation for the distributor to carry only Champion products. Stitt alleges, however, that Champion secured such agreements under the guise of a promotional program known as "Feature Line Selling." Under the program, Champion analyzed the distributor's rate of inventory turnover to determine which non-Champion brands were worth carrying; the underlying principle was that a distributor could reduce inventory costs by carrying only Champion's full line of plugs. Champion supplemented this persuasion by offering distributors promotional gifts, ranging from jackets to refrigerators, if they removed competing spark plugs from their shelves. Several former Champion salespersons and supervisors testified that these incentives persuaded at least three distributors to agree to stop carrying Stitt plugs.

Whether there were exclusive dealing contracts was a jury question, perhaps, but it does not follow that the district court erred in its directed verdict. While Stitt proved that a handful of distributors once removed Stitt plugs from their shelves, Stitt proved no instance in which a distributor honored an exclusive dealing agreement by refusing to purchase Stitt plugs. In addition, there was no testimony that any distributor agreed to refrain from selling competing plugs for any specified

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17. 15 U.S.C. § 14.

period of time.[18] There was no evidence that a distributor who failed to abide by the agreement would be subject to any sanction and hence no reason to believe distributors did not feel free to stock competing plugs. More to the point, Stitt did not prove the extent to its foreclosure from the replacement market; Stitt offered no comparison between the number of distribution outlets available and the number of those foreclosed. Without more, no reasonable jury could have concluded that Champion's efforts foreclosed a "substantial share of the relevant market."[19]

Finally, Stitt's theory of the original-equipment preference is inconsistent with its claim that Champion denied Stitt access to the replacement market through exclusive-dealing contracts. Stitt would not gain much from access to distributors' shelves if Stitt could not place its plugs in original equipment and capture the consumer preference. Stitt's proof leads to the inescapable conclusion that the main competitive battle in this industry is fought at the front door of the original-equipment manufacturer. The jury was offered no proof that any anticompetitive practice of Champion handicapped Stitt in that fight.

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18. *Cf. Denison Mattress Factory v. Spring-Air Co.*, 308 F.2d 403, 412 (5th Cir. 1962) (finding exclusive-dealing contract permissible because it was terminable without cause in six months). The Seventh Circuit also recently has concluded that because they lack any serious anticompetitive effect, "[e]xclusive-dealing contracts terminable in less than a year are presumptively lawful under section 3." *Roland Machinery Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 395 (7th Cir. 1984).

19. *See Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 328-29, 81 S. Ct. 623, 628-29, 5 L.Ed.2d 580 (1961). We assume without deciding that Stitt adequately defined the relevant market. The district court held that Stitt never demonstrated which manufacturers and models of spark plugs should be included in the market for industrial plugs. We need not reach the issue.

III

Stitt also challenges the judgment on the basis of two evidentiary rulings. One ruling precluded discovery and admission of evidence as to any matter before April 15, 1978, the date of an existing antitrust settlement between Stitt and Champion. The other ruling excluded from evidence a 1953 cease-and-desist order entered against Champion by the Federal Trade Commission. Keeping in mind that such evidentiary rulings are reviewable for abuse of discretion,[20] we find neither ruling to be a basis for reversal.

A

[4] The parties entered into a settlement on April 15, 1978, in which Stitt released Champion of any antitrust claims Stitt may have had at that time. The district court refused discovery of any document relating to Champion's activities before the settlement. The court also ordered such evidence excluded at trial.

Stitt argues persuasively that even though it could not sue Champion for conduct before the settlement, such conduct may be relevant to Champion's post-settlement activities and thus discoverable and admissible.[21] The argument is sound, as far as it goes. However, we will reverse a judgment for an evidentiary ruling such as this only if it affects the "substantial rights of the parties."[22]

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20. *See Jon-T Chemicals, Inc. v. Freeport Chemical Co.*, 704 F.2d 1412, 1417 (5th Cir. 1983).

21. Many courts have followed a similar principle in permitting discovery of evidence pertaining to a defendant's conduct occurring before a limitations period has run. *See* Wright & Miller, Federal Practice & Procedure: Civil § 2009 n. 38 (1970 and Supp. 1987).

22. *See* Fed. R. Evid. 103(a); *Tugwell v. A. F. Klaveness &*

Stitt has yet to articulate a legitimate theory of antitrust liability or to explain how the limit on discovery caused any prejudice. On these facts we will not speculate that the denial of discovery altered the result in this case.

B

[5] An FTC investigation of Champion begun in the late 1940s resulted in a cease-and-desist order against the company based on violations of the antitrust laws. Although no copy of the 1953 order appears in the record, Stitt urges that it would have tended to prove that Champion engaged in a "common scheme or pattern of conduct" to violate the antitrust laws and should have been admitted. But such an aged order is not probative of Champion's present practices. Moreover, because the order pertained only to Champion's conduct in the market for automotive spark plugs, it is of little relevance to Champion's present practices in the industrial-plug market.

[6] Nor did excluding the order contravene 15 U.S.C. § 16(a), which provides that "a final judgment or decree" in an antitrust proceeding brought by the government constitutes "prima facie evidence" against the defendant in any subsequent proceeding brought by a non-government party "as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto." Again, the conduct of which Stitt complains does not extend back three decades; the order would have no collateral estoppel effect if the government brought these claims.

AFFIRMED.

Co., 320 F.2d 866, 868 (5th Cir. 1963), *cert. denied*, 376 U.S. 951, 84 S. Ct. 967, 11 L.Ed.2d 970 (1964).

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 87-2656

D.C. Docket No. H-82-1087

STITT SPARK PLUG COMPANY,
Plaintiff-Appellant,

v.

CHAMPION SPARK PLUG COMPANY,
Defendant-Appellee.

Appeal from the United States Distict Court for the Southern District of Texas

(Filed April 1, 1988)

Before BROWN, JOHNSON, and HIGGINBOTHAM, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendant-appellee the costs on appeal, to be taxed by the Clerk of this Court.

April 1, 1988

ISSUED AS MANDATE: May 19, 1988.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 87-2656

STITT SPARK PLUG COMPANY,
Plaintiff-Appellant,

v.

CHAMPION SPARK PLUG COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the
Southern District of Texas

ON PETITION FOR REHEARING

(April 29, 1988)

Before BROWN, JOHNSON and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ PATRICK E. HIGGINBOTHAM
United States Circuit Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 87-2656

STITT SPARK PLUG COMPANY,
Plaintiff-Appellant,

v.

CHAMPION SPARK PLUG COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the
Southern District of Texas

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion April 1, 5 Cir., 1988, ____F.2d____)

(May 9, 1988)

Before BROWN, JOHNSON and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ PATRICK E. HIGGINBOTHAM
United States Circuit Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-82-1087

STITT SPARK PLUG COMPANY,
Plaintiff,

v.

CHAMPION SPARK PLUG COMPANY,
Defendants.

(Filed May 19, 1987)

FINDINGS OF FACTS

1. *Jurisdiction.*

The Stitt Spark Plug Company and the Champion Spark Plug Company were founded in the second decade of this century in Ohio. Since 1917, they have been direct competitors. Stitt's principal office now is in Conroe, Texas. Champion's headquarters remain in Toledo, Ohio.

2. *Geographic Market.*

Although the evidence suggests several equally plausible geographic markets, the court assumes that the continental United States is the geographic market in which Stitt and Champion compete because that is the one that Stitt prefers.

3. *Product Market.*

There are six product groupings that have been sug-

gested as the relevant market to support Stitt's antitrust claims. They are:

(1) Whole: all plugs.

(2) Industrial: all plugs whose principal applications are large or fixed installations.

(3) Commercial: includes all plugs whose principal applications are automobiles, chain saws, generators, outboard motors, and other small and mobile installations.

(4) Dual: all spark plugs whose applications are equally efficient in commercial and industrial markets.

(5) Pleaded: includes (a) industrial only plugs, but not all industrial plugs, plus (b) dual plugs manufactured by Champion, excluding (c) dual plugs manufactured by other companies. This is the market on which Stitt builds its claim.

(6) Combination: the industrial only plugs plus the dual use plugs (markets 2 plus 4).

There was no evidence about the market shares of Stitt or Champion in the commercial, dual, or combination markets. The market shares in the other groupings are:

	Whole	Industrial	Pleaded
Stitt	0.1%	25%	3%
Champion	20.0%	70%	97%
Others	79.9%	5%	0%

There were several examples of excluded Champion plugs that were indistinguishable from included Champion plugs. The Stitt market claim is embodied in Stitt's exhibit 277 (Champion 41). Stitt developed this exhibit

during discovery in response to an order to produce a list of plugs by manufacturer and model that defined the relevant product market.

There was no evidence to support the inclusion or exclusion of plugs made by Stitt, Champion, or other companies in the market defined by Stitt 277. Plugs that were interchangeable with those on Stitt 277 were inexplicably excluded. There must be evidence of some factor that is relevant to market dominance for each component of the market that the plaintiff claims is dominated, for instance, manufacturing requirements (equipment, materials, technology, or volume), production costs, marketing costs, availability for interchange, selling price, product acceptance in submarkets, or distribution limitations that rationally justify the inclusion or exclusion.

There are other substantial manufacturers active in the domestic United States plug market, yet no plug manufactured by AC, Autolite, Bosch, Motorcraft, NGK, or Nippodenso was included in Stitt 277. The pleaded market includes diesel glow plugs and furnance starters that are not spark plugs at all. Stitt treated a Champion plug for commercial purposes that sold for about $3 and a Stit plug for special purposes that sold for about $14 as equivalent plugs that could be categorized in the same market.

4. *Pricing.*

Champion sells plugs to original equipment manufacturers at a price that is less than the price Champion charges distributors. Original equipment manufacturers (OEMs) are the companies that build equipment that

requires plugs, like chainsaws, outboard motors, cars, and lawnmowers. The consuming public frequently buys a replacement plug on the sole basis of what plug came with the machine. For a manufacurer to have its plugs included with the equipment originally, then, is an effective marketing strategy for building a demand for its plugs in the replacement market. Stitt is successful in having its plugs included with the original equipment in some cases. Stitt has been able to undercut Champion in some sales to OEMs.

Stitt offered no evidence of a single transaction in which a sale was lost to Champion because of Champion's below cost sales to OEMs. Stitt did not compete directly with many of the plugs that Champion sells to OEMs. If Champion were under-pricing its OEM plugs, to present an antitrust complaint Stitt would have to show that Champion was making up the loss on some class of plugs that were not subject to competition; this Stitt has not done. While Champion is a large successful spark plug company, it has no rationally defined market in which there is an absence of competition.

Stitt challenged Champion's sales tactics (including pricing and promotion) with two categories of evidence: (a) Champion salesmen recounting sales meeting pep talks about driving the competition from the field and similar hyperbole, and (b) whining by Stitt's principals.

There was no evidence that Champion paid directly, or lowered prices, to distributors who discontinued carrying Stitt plugs. Champion apparently had a sales strategy that was based on broad use of a few Champion plugs for many applications under the interchange tables. This was an appeal to the distributor's profit margin by showing him how to reduce his inventory costs.

5. *Predatory Pricing.*

Assuming the evidence is true that Champion sold plugs at a lower price to NAPA (a large chain of automobile parts stores) than it sold to other warehouse distributors, there was no evidence that Stitt lost any sales to NAPA or that the discount was not justified on a volume and distribution savings. No evidence was offered by Stitt to establish how the competing plug manufacturers were pricing their products to NAPA or original equipment manufacturers; indeed, at least two of Champion's largest competitors are wholly owned by Ford and General Motors.

There was no evidence of any contract, combination, or conspiracy to foreclose Stitt's participation in any market by Champion. No suggestion was made that there was a shortage of any model plug whose delivery would be provided by Champion if the dealer dropped Stitt, or any variation on that theme.

During all of the years at issue, Champion sold its products at a price above its average variable cost. Champion's internal cost accounting did not adjust for high-labor low-volume plugs in reducing the share of plant and machinery costs attributed to them. The converse was true for highly automated plugs whose internal costs apparently carried a disproportionate share of the labor-determined overhead. Assuming some models were sometimes sold below cost, the sales by year of all of that model was not shown to be under Champion's cost, much less the company's whole product line.

The only evidence of Champion's predatory intent is the statements of sales managers that Champion wanted to sell more plugs. Champion was competing with others

than Stitt, and it is impermissable to infer that the object of every Champion price and tactic was Stitt.

6. *Damages*

There was no evidence that Stitt had been damaged from any activity of Champion. The jury was left to infer that Stitt's sales and profits troubles were the result of Champion. The only evidence that Stitt relied on as a predicate for damage was its unused plant capacity, but this was never linked to Champion. In this case, Stitt had the burden of separating its damages in this action from those that may have been caused by acts of Champion before 1978, which damages were barred by a settlement of an earlier suit. This was not done.

The only evidence Stitt's accountant offered on pricing was that, "assuming all other things to be equal," some Champion plugs that were interchangeable with a Stitt plug were sold to some below what Champion's internal cost process indicated the costs were. The assumption cannot be accepted as evidence.

7. *Entry Barriers.*

No account of barriers to entry in the business by reason of equipment, transportation, tariffs, marketing, or patents was attempted. Neither was there any evidence on the price-volume relationship, the price effect on non-standard replacements and new market entrants. The equipment for the manufacture of plugs is readily available. No particular location is required to make plugs; any industrial site will do.

Signed on May 19, 1987, at Houston, Texas.

/s/ LYNN N. HUGHES
Lynn N. Hughes
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-82-1087

STITT SPARK PLUG COMPANY,
Plaintiff,

v.

CHAMPION SPARK PLUG COMPANY,
Defendants.

(Filed May 19, 1987)

CONCLUSIONS OF LAW

1. *Relevant Market.*

Stitt failed to establish a relevant market. To form a relevant market at law, Stitt must (1) define with reasonable precision an area in which all the products that compete among themselves do not compete with any product from outside the area and (2) show that there are substantial barriers to the entry into the market by producers not presently active in the market; inactivity in the market must be due to barriers like inaccessibility of a territory or economic impracticability of making the product. These barriers must subsist in the face of monopoly pricing within the market.

2. *Geographic Component.*

Stitt proposed the United States as its geographic market. No evidence was offered to justify excluding Japa-

nese or European plug manufacturers or consumers, especially the original equipment manufacturers. Stitt and Champion sell worldwide. Stitt's geographic market fails.

3. *Product Component.*

Assuming the United States to be a properly limited territory, Stitt defines the product market as those plugs listed on Stitt 277 (Champion 41). The list can be described as most of Stitt's industrial and commercial plugs, plus most of Champion's industrial plugs and most of Champion's dual use plugs (either commercial or industrial uses), excluding the industrial only, commercial only, and dual use plugs of all other manufacturers.

No rationale supports the exclusion and inclusion. Stitt excluded some of its own industrial plug types without explanation. Whether in terms of use, manufacturing cost, sales price, manufacturing difficulty, territory of consumption, place of manufacture, interchangeability, and nature of original equipment manufacturers, the list is contrived arbitrarily.

4. *Replacement-OEM Distinction.*

Stitt claimed a market distinction between original equipment manufacturers and replacement sales. Stitt admitted that the attractiveness of sales to OEMs was that it enhanced the likelihood that the replacement sales would be of a like kind. The interdependence of the OEM sales and the replacement sales puts them in the same market. Plug manufacturers, including Stitt, are willing to sell plugs below cost to OEMs to reap the profits from repeat replacement sales above costs.

The group defined by Stitt 277 is not a group of all plugs that are sold as original equipment; if OEM sales were a distinct market, all OEM sales must be accounted for in the market data. There is no evidence on the sales volumes or model types of other manufacturers, whether in the OEM or replacement ends.

5. *Excluded Competitors.*

Stitt produced no evidence from which one could conclude that the price of Champion's plugs on Stitt 277 was independent of the price of, for example, Autolite, whose plugs are designed for the same application. This failure is complete for every other manufacturer except Stitt and Champion.

A monopolizer must be able to expect to recover his losses from driving the competitor out of business by his subcost pricing from later monopolistic sales at a high profit. If Stitt were to fail, Champion would be constrained by competition from numerous other companies from raising its prices. The Stitt evidence on the market mechanism in spark plugs was non-existent.

6. *Price Discrimination.*

Stitt did not prove that Champion sold a full line of its products to any class of customers at a price below its average variable manufacturing cost. Below cost sales to some OEMs on some plug types is not predatory pricing.

Stitt's calculation of Champion's cost did not account for either the limitations inherent in its internal practices that distort the figures it uses or the revenue generated by the replacement sales attributable to the plug's

being in the original equipment. The loss on OEM sales can be treated like an advertising expense that is incurred well before the market impact.

7. *Entry Barriers.*

Entry barriers sufficient to create a market in which predatory, monopolistic pricing could occur with impunity do not exist for spark plugs. The equipment for the manufacture of plugs is generally available and indistinct from countless other forms of capital equipment. Plugs can be made anywhere, with no unique requirements for a site.

8. *Exclusive Dealing.*

Champion's sales efforts do not amount to an attempted exclusive dealing arrangement. The character of the promotion was an accurate explanation of how dealers could cut their costs. No shortages of popular models existed that Champion exploited to get the dealers to carry other Champion models or to quit carrying Stitt plugs. Stitt identified no dealer who ceased selling Stitt plugs because of any combination or agreement with Champion; no lost sale was identified.

9. *Damages.*

Stitt identified no lost sale as a result of Champion's price reduction for NAPA under its other dealers' prices. The price differential between OEMs and replacements is dictated by the benefits running to the supplier of original equipment, not by the intent to destroy Stitt. Stitt has suffered no antitrust injury as a result of the OEM pricing.

Stitt did not prove that an increase in Champion's price on any plug would enable it to sell more plugs than it is selling now or at a higher price. There is no evidence about what price or volume would attract either new suppliers or new buyers to Stitt. Indeed, if Champion were to fail, there was no evidence to support the conclusion that Stitt would benefit at all.

10. *Prior Litigation.*

No separation was made between pre-1978 practices of Champion and their damage to Stitt and the acts and damages in this suit.

11. *Conclusion.*

The Stitt Spark Plug Company is entitled to recover nothing from the Champion Spark Plug Company. The costs of court will be taxed against Stitt.

Signed on May 19, 1987, at Houston, Texas.

/s/ LYNN N. HUGHES
Lynn N. Hughes
United States District Judge

Supreme Court, U.S.
FILED
SEP 9 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-249

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

STITT SPARK PLUG COMPANY,

Petitioner,

v.

CHAMPION SPARK PLUG COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTIONS PRESENTED

1. May a claim of predatory pricing be established without proof that defendant has foregone profit as a means of eliminating competition?

2. Can a manufacturer be found to have engaged in unlawful exclusive dealing, without proof (1) that customers honored alleged agreements not to deal in competitors' merchandise, (2) that any customer agreed to refrain from selling competing merchandise for any specified period of time, or (3) that any customer who failed to abide by the alleged agreement would be subject to any sanction?

STATEMENT REQUIRED BY SUPREME COURT RULE 28.1

Respondent Champion Spark Plug Company has no parent companies, subsidiaries (except wholly-owned subsidiaries), or affiliates.

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OCTOBER TERM, 1988

STITT SPARK PLUG COMPANY,

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v.

CHAMPION SPARK PLUG COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals is reported at 840 F.2d 1253 (5th Cir. 1988).

RESTATEMENT OF THE CASE

In this private antitrust suit petitioner Stitt Spark Plug Company charged respondent Champion Spark Plug Company with predatory pricing, price discrimination, and unlawful exclusive dealing. After Stitt rested its case in chief, the trial court granted Champion's motion for directed verdict. A panel of the United States Court of Appeals for the Fifth Circuit unanimously affirmed.

Champion and Stitt are competing manufacturers of spark plugs. Champion makes a full line of spark plug "models," known in the industry as "types," for all kinds of engines.

Stitt specializes in spark plugs for stationary engines used principally in the oil and gas industry. The term "industrial spark plugs" is sometimes used to refer to the specially designed, relatively low-volume, relatively high-priced spark plugs of the kind Stitt manufactures, although in this case Stitt gave the term a much broader meaning, extending even to Champion conventional automotive plugs. *See* Trial Court's Findings of Fact, R. Tab 240 at 15-16[1]; *compare* PX277 [list of "industrial" spark plugs prepared by Stitt] *with* DX41 [Champion listing of applications by plug type, listing many of such plugs for use in automobiles, outboard motors, etc.].

Spark plug manufacturers sell spark plugs directly to engine and vehicle manufacturers for factory installation as "original equipment." Plug manufacturers also sell plugs to marketers known as distributors, who in turn resell them for replacement purposes. Stitt contended that, in recognition of the tendency of engine and vehicle operators to replace worn spark plugs with the same brand installed in the engine as original equipment, a phenomenon Stitt called the "OE tie," Champion charged a lower price to OE purchasers than to "replacement" purchasers.

Stitt alleged that the difference between Champion's OE and replacement prices constituted unlawful price discrimination under Clayton Act Section 2(a), 15 U.S.C. §13(a). Stitt also contended that Champion's OE prices were below Champion's "average variable cost" of manufacture, and were therefore predatory and amounted to actual or attempted monopolization in violation of Sherman Act Section 2, 15 U.S.C. § 2. In addition, Stitt charged that Champion had

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[1] Citations to the record will be by the abbreviation "R.Tab" followed by the index tab number affixed by the district court clerk to materials in the first twelve volumes, together with the stamped page number assigned by the district clerk if necessary. "DX" and "PX" refer, respectively, to defendant's and plaintiff's trial exhibits.

entered into agreements with resellers of spark plugs prohibiting them from handling the Stitt line, in violation of Sherman Act Section 1, 15 U.S.C. § 1, and Clayton Act Section 3, 15 U.S.C. § 14.

Stitt contended that the relevant market for purposes of assessing Champion's actions was sales of what it called "industrial spark plugs" and that this alleged market comprised separate OE and replacement "submarkets." The term "industrial spark plugs" was never clearly defined. There was considerable dispute over whether "industrial spark plugs," however defined, could be a relevant market and over which spark plug brands and types were relevant to the case.

Trial commenced in August 1986 before Judge Lynn N. Hughes and a jury. With regard to Stitt's charge of unlawful exclusive dealing, the Fifth Circuit summarized the evidence as follows:

> The written agreement between Champion and its distributors disclaimed any obligation for the distributor to carry only Champion products. Stitt alleges, however, that Champion secured such agreement under the guise of a promotional program known as "Feature Line Selling." Under the program, Champion analyzed the distributor's rate of inventory turnover to determine which non-Champion brands were worth carrying; the underlying principle was that a distributor could reduce inventory costs by carrying only Champion's full line of plugs. Champion supplemented this persuasion by offering distributors promotional gifts, ranging from jackets to refrigerators, if they removed competing spark plugs from their shelves. Several former Champion salespersons and supervisors testified that these incentives persuaded at least three distributors to agree to stop carrying Stitt plugs.

> . . . While Stitt proved that a handful of distributors once removed Stitt plugs from their shelves, Stitt provided no instance in which a distributor honored an exclusive dealing agreement by refusing to purchase Stitt plugs. In addition, there was no testimony that any distributor agreed to refrain from selling competing plugs for any specified period of time. There was no evidence that a distributor who failed to abide by the agreement would be subject to any sanction and hence no reason to believe distributors did not feel free to stock competing plugs. . . .

840 F.2d at 1257-8 (footnote omitted).

Stitt's proof of Champion's alleged predatory pricing consisted of testimony by Stitt's accountant, who, with respect to certain Champion spark plug types selected by Stitt or its counsel, compared Champion's selling prices with his estimate of Champion's "average variable cost" to manufacture each of those types. His analysis showed that some of the selected Champion plug types were priced below his estimate of Champion's "average variable manufacturing cost." It was undisputed, however, that the Champion plug types Stitt treated as "industrial spark plugs" were, in the aggregate, priced *above* Stitt's estimate of Champion's average variable cost of manufacturing those plug types. DX 62, 63; R.Tab 240 at 19-20.

At the close of Stitt's case, Judge Hughes granted Champion's motion for directed verdict. As he explained his ruling from the bench and in a later memorandum containing findings of fact and conclusions of law, R.Tab 240, 241, Judge Hughes was of the view that Stitt had simply failed to prove any essential element of its claims.

On appeal, a unanimous panel of the United States Court of Appeals for the Fifth Circuit affirmed, in an opinion by Judge Patrick Higginbotham. With regard to Stitt's claim of predatory pricing, Judge Higginbotham observed that, in

calculating the "price" that Champion received on a sale of its plugs, Stitt had looked only at the current revenue received on the sale and had disregarded future revenue that might be generated by virtue of the consumer's tendency to replace worn plugs with the original equipment brand. In doing so, Stitt contradicted its theory of the "OE tie," which held that Champion set its OE prices at low ("predatory") levels with the expectation of receiving higher prices on later replacement sales generated by the alleged "tie." Thus, Stitt failed to make "any meaningful comparison of cost and price." 840 F.2d at 1256.

Moreover, Judge Higginbotham pointed out that Stitt's claim of "predatory pricing" did not actually involve "predation" at all, in the sense of conduct that can benefit the predator only by eliminating competitors and thereby allowing the predator to raise prices to noncompetitive levels. Under Stitt's curious theory of "predation" Champion was incurring losses by charging low OE prices but simultaneously recouping the losses by charging higher prices on replacement sales in the face of continuing competition from Stitt and other plug manufacturers. Champion's ability to recoup its "losses" obviously did not depend on first eliminating Stitt or others from the marketplace. Thus Stitt's claim that Champion's pricing policy was aimed at eventually achieving market power was implausible. *Id.*

Judge Higginbotham turned next to Stitt's charge that Champion had unlawfully discriminated in price merely by charging a different price on OE sales than on replacement sales. Judge Higginbotham observed that under settled Fifth Circuit precedent — which Stitt does not challenge here — the crucial element of "competitive injury" in a price discrimination suit brought by a competitor of the defendant (a "primary line" case) can be established only by proof that defendant's prices were "predatory" in the same sense re-

quired under Sherman Act Section 2. Stitt's failure to prove predation, as explained above, was therefore also fatal to its price discrimination claim. *Id.* at 1257.

Finally, with respect to Stitt's exclusive dealing claim, Judge Higginbotham said that "perhaps" Stitt had introduced enough evidence to reach the jury on the existence of alleged exclusive dealing agreements; but that Stitt had failed to furnish any basis for the finding — an essential element of exclusive dealing claims under both Section 1 and Section 3 — that such agreements had foreclosed Stitt from any "substantial" part of the market. *Id.* at 1257-8.

SUMMARY OF ARGUMENT

The judgment below is correct. In failing to account for Champion's replacement sale revenue — which according to Stitt's theory of the "OE tie" would be assured by selection of the Champion brand as original equipment — Stitt accounted for only part of the "price" received by Champion. Stitt thus failed to establish the most fundamental element of a claim of "below cost" pricing: that the "price" was in fact *below* cost. Moreover, by showing that Champion was presently recouping its alleged OE losses through replacement sales, Stitt's evidence contradicted any inference that Champion's pricing strategy was intended to eliminate Stitt as a competitor. With regard to Stitt's claim of exclusive dealing, Stitt failed to show that Champion's alleged exclusive dealing agreements with customers had any market impact, much less that they foreclosed Stitt from a "substantial" portion of the relevant market. Finally, there is no substance whatever to Stitt's claim that the opinion below conflicts with prior decisions of this Court or of the Fifth Circuit.

ARGUMENT

I. THE FIFTH CIRCUIT CORRECTLY HELD THAT STITT WAS NOT ENTITLED TO REACH THE JURY ON ITS CLAIM OF PREDATORY PRICING.

A. Stitt Did Not Offer Proof that Champion's "Price" was Below its Cost.

"Predatory" pricing is "pricing below an appropriate measure of cost for the purpose of eliminating competitors in the short run and reducing competition in the long run." *Cargill, Inc.* v. *Montfort of Colorado, Inc.*, — U.S. —, 107 S. Ct. 484, 493 (1986); *see also Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 584 n.8 (1986).[2] The most basic part of a predatory pricing case, therefore, is proof that defendant's price was below its "cost."

Stitt contended that Champion deliberately set its OE prices at low levels in the belief that it would recoup its OE "losses" by charging higher prices on the replacement sales to be generated by virtue of the "OE tie." *See, e.g.*, R. Tab 188 at ¶ 18 [Stitt's First Amended Complaint]. If this is true, it follows that Champion must, in setting its low OE price, take into account the revenue it will receive on replacement sales at the higher replacement price. "When Champion sets the prices for original-equipment plugs, the expected return includes not only the price paid by the original-equipment manufacturer, but also the replacement purchases that probably will follow." 840 F.2d at 1256. Logically, then, a charge that Champion's price was "predatory" must consider antici-

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[2] In the Fifth Circuit, the "appropriate measure of cost" in a predatory pricing case is "average variable cost." International Air Industries, Inc. v. American Excelsior Co., 417 F.2d 714 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976). The instant case presents no question concerning whether average variable cost should be used in determining defendant's costs for purposes of a predatory pricing claim.

pated replacement sales revenues in calculating the "price" Champion receives when it makes an OE sale.

When Judge Higginbotham said that it was necessary to "look at the original and replacement markets together," *id.*, he was not ignoring the alleged distinction between the supposedly "separate" OE and replacement "submarkets," or "finding" that only a "single market" existed. *See* Petition for Certiorari at 18-19. He was not treating market definition at all.[3] Rather, he was simply saying that Stitt, having alleged that Champion set its OE prices with the expectation of receiving additional revenue on replacement sales, logically should take Champion's replacement revenues into account in determining Champion's OE "price." Stitt's failure to do so precluded "any meaningful comparison of price and cost." 840 F.2d at 1256.

B. Champion's Alleged Pricing Policy Was Not "Predatory" Because Champion's Ability to Recoup Alleged "Losses" Did Not Require Elimination of Competition.

As noted above, this Court in *Cargill, supra*, explained that predatory pricing was aimed at "eliminating competitors in the short run and reducing competition in the long run." 107 S.Ct. at 493. In *Matsushita, supra*, the Court observed that predatory pricing schemes could not hope to succeed (and presumably would not be attempted by rational firms) without some assurance that competitors could be eliminated and kept out long enough to raise prices, recover losses suffered

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[3] His opinion expressly refrained from reaching the market definition question. 840 F.2d at 1258 n.19. Nor was he necessarily "extending" the holding of Bayou Bottling, Inc. v. Dr. Pepper Co., 725 F.2d 300 (5th Cir.), *cert. denied*, 469 U.S. 833 (1984), that proof of predatory pricing must consider the entire product line on which the parties compete, rather than isolated products within the line. Plainly, Judge Higginbotham cited *Bayou Bottling* merely as analogous support: his citation of the case is preceded by "*cf.*" 840 F.2d 1256 n.11.

during the campaign of predation, and earn enough additional gain to make the effort worthwhile:

> [T]he success of [predatory pricing] schemes is inherently uncertain: the short-run loss is definite, but the long-run gain depends on successfully neutralizing the competition. Moreover, it is not enough simply to achieve monopoly power, as monopoly pricing may breed quick entry by new competitors eager to share in the excess profits. The success of any predatory scheme depends on *maintaining* monopoly power for long enough both to recoup the predator's losses and to harvest some additional gain. Absent some assurance that the hoped-for monopoly will materialize, and that it can be sustained for a significant period of time, "[t]he predator must make a substantial investment with no assurance that it will pay off." Easterbrook, Predatory Strategies and Counterstrategies, 48 U. Chi. L. Rev. 263, 268 (1981). For this reason, there is a consensus among commentators that predatory pricing schemes are rarely tried, and even more rarely successful . . . .

475 U.S. at 589 (emphasis supplied).[4]

As Judge Higginbotham noted, Champion's allegedly "predatory" behavior was quite different from the conduct considered in *Matsushita* and *Cargill*. Champion's ability to "raise" prices (*i.e.*, charge the higher replacement price) did not depend on first eliminating Stitt from the market. Indeed, Champion was charging the higher replacement prices and recouping its alleged "losses" on OE sales in the face of continued competition from Stitt and numerous other spark plug manufacturers. The record showed that no fewer than six manufacturers other than Stitt and Champion sold spark plugs in the United States for applications utilizing what Stitt

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[4] Contrary to Stitt's suggestion that *Matsushita* applies only to cases charging unlawful concerted action, *see* Petition at 16-17, the *Matsushita* opinion expressly declares that the language just quoted applies "even to predatory pricing by a *single firm* seeking monopoly power." 475 U.S. at 590 (emphasis supplied).

alleged were Champion "industrial" spark plugs. *See* DX 35-38, 197 [competitors' catalogs], PX 277 [Stitt list of "industrial" spark plugs including plugs made by French firm BG]. Stitt could and did take advantage of the OE "tie" by offering low OE prices of its own, *e.g.*, DX 104, 113, 138, 141, 143 [Stitt offers to sell at 6¢ per plug.] Indeed, Stitt's witnesses testified that the OE tie would work for *any* manufacturer who succeeded in having its plugs installed at the factory. *See* 840 F.2d at 1256. Stitt failed to show that Champion's pricing strategy was anything other than a rational response to the market phenomenon described as the "OE tie."

II. THE FIFTH CIRCUIT CORRECTLY HELD THAT STITT'S FAILURE TO SHOW ANY ACTUAL MARKET FORECLOSURE WAS FATAL TO ITS EXCLUSIVE DEALING CLAIM.

Even if Champion had entered into exclusive dealing agreements with spark plug marketers, it could not be found to have violated either Sherman Act Section 1 or Clayton Act Section 3 without proof that such agreements actually prevented Stitt from selling its products to a substantial segment of the relevant market. "[T]he competition foreclosed by the contract must be found to constitute a substantial share of the relevant market. . . . [A] mere showing that the contract itself involves a substantial number of dollars is ordinarily of little consequence." *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U.S. 320, 328-39 (1961). "Exclusive dealing is an unreasonable restraint of trade only when a significant fraction of buyers or sellers are frozen out of a market by the exclusive deal." *Jefferson Parish Hospital Dist. No. 2* v. *Hyde*, 466 U.S. 2, 45 (1984) (concurring opinion of O'Connor, J.).

As Judge Higginbotham noted, Stitt failed to show *any* foreclosure by reason of alleged exclusive dealing contracts between Champion and its customers. There was no evidence that a single customer actually stopped buying plugs

from Stitt; no evidence that any marketer agreed to cease or reduce his purchases from Stitt for any period of time; no evidence that any customer risked sanctions for stocking or promoting Stitt plugs. Stitt's own records showed that all the Stitt customers who were identified by name as having "exclusive dealing" agreements with Champion continued buying plugs from Stitt. DX 5-10. At most, Stitt proved only that a handful of distributors, persuaded that some Stitt plugs were not sufficiently profitable to keep them in inventory, returned them to their suppliers. This is not "foreclosure," much less "substantial" foreclosure.

III. STITT'S CLAIMS OF CONFLICT WITH OTHER DECISIONS ARE WITHOUT MERIT.

Stitt's claims that the opinion below conflicts with other decisions are no more substantial than its other claims. With respect to *Ford Motor Co.* v. *United States*, 405 U.S. 565 (1972), Stitt's position is incomprehensible. Although Stitt says that *Ford* "defines *two markets* and not one market," Petition at 19 (emphasis supplied), *Ford* very plainly did *not* "define" any market (*Ford* was a vertical merger case arising from Ford's acquisition of a spark plug manufacturer; the opinion deals chiefly with the issue of appropriate remedies.) Nor, as seen earlier, did the opinion below reach the question of market definition. For the same reason, Stitt's claim of conflict with various Fifth Circuit decisions holding that market definition is a fact issue, Petition at 19, is utterly without merit: the Fifth Circuit did not "substitute" its views for those of the factfinder because it never reached the issue.

As for Stitt's claims that the opinion below conflicts with Fifth Circuit decisions establishing the elements of proof of predatory pricing (*Adjusters Replace-A-Car* v. *Agency Rent-A-Car, Inc.*, 735 F.2d 884 (5th Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985), and *International Air Industries, Inc., supra*), *see* Petition at 17, it suffices to say (putting aside the question

whether such a conflict if actually shown would warrant review by certiorari) that the Fifth Circuit simply held that Stitt did not satisfy the standards of proof established by those cases.

This applies equally to Stitt's contention that the opinion below conflicts with Fifth Circuit precedent establishing the elements of unlawful exclusive dealing, Petition at 20. *Dillon Materials Handling, Inc.* v. *Albion Industries*, 567 F.2d 1299 (5th Cir), *cert. denied*, 439 U.S. 832 (1978), the allegedly conflicting opinion, held that a terminated distributor charging unlawful exclusive dealing had to show, first, "that its purchases as a distributor . . . were made on the 'condition, agreement, or understanding' that it would not sell [competitors' products]" and, second, that such an agreement "had the requisite effect on competition." 567 F.2d at 1302. How Judge Higginbotham's opinion in the instant case "conflicts" with this is not apparent; Judge Higginbotham upheld the directed verdict on Stitt's exclusive dealing claim precisely because Stitt failed to demonstrate the "requisite effect on competition."

Stitt's failure of proof also obviates any claim of conflict with *Heatransfer Corp.* v. *Volkswagenwerk A.G.*, 553 F.2d 964 (5th Cir. 1977), *cert. denied*, 434 U.S. 1087 (1978), which, Stitt says, stands for the principle that "below cost selling alone, in a definable market, taken together with the size of the market share (99%), is probative of monopolization." Petition at 18. Without reaching the question whether that is a fair characterization of *Heatransfer*, it is enough to note that the Fifth Circuit in this case held that Stitt did not *prove* "below cost selling."

CONCLUSION

For the foregoing reasons, Champion respectfully requests that the Petition be denied.

Respectfully submitted,

September 9, 1988

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CERTIFICATE OF SERVICE

I certify that three true and correct copies of the above and foregoing Respondent's Brief in Opposition were served upon the attorney of record for petitioner, Wayne H. Paris, O'Dell, Paris & Dugger, Suite 700, 550 Westlake Park Blvd., Houston, Texas 77079, by depositing them in a United States post office, first class postage prepaid, on this 9th day of September, 1988. I further certify that all parties required to be served have been served.

RUFUS W. OLIVER, III
A Member of the Bar of this Court